IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1390

PETER DORNAU, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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1. As noted in the petition and the memorandum in opposition, there is dictum in United States v. Calandra, 414 U.S. 338,

345-46, that an indictment based on testimony obtained in violation of the Fifth Amendment is nevertheless valid. However the dismissal in the instant case was not based, as the government suggests, merely upon the sources of the evidence used to secure the indictment (memorandum in opposition pp. 1, 3, 4). The trial court also made findings with respect to the evidence the government proposed to use on the trial (Pet. App. A-4).

Indeed the hearing in the trial court was expanded specially for that purpose, in light of Kastigar v. United States, 406 U.S. 441 (A4-7). The trial court found, at the conclusion of the hearing, that Petitioner's coerced testimony could have been used in a variety of ways in the course of the prosecution (A-15). The dismissal followed from the rule of Kastigar that the government

must prove that "all of the evidence it proposes to use" was obtained from legitimate sources, and that compelled testimony cannot be used "in any respect" (A-6, A-15, this Court's emphasis).

As the dismissal was not based on a finding that the grand jury evidence may have been unlawfully obtained, the dictum in United States v. Calandra does not dispose of the issues raised in the petition for certiorari. On the contrary, the Court stated in Calandra that the government may not use illegally obtained evidence, or information derived from such evidence, in the context of a criminal trial. 414 U.S. at 354.

2. In support of its argument that there is no conflict in the circuits as to the scope of immunity provided by Section 7(a)

of the Bankruptcy Act, 11 U.S.C. 25(a), the government maintains that the Fifth Circuit's decision in United States v. Seiffert, 463 F.2d 1089, was implicitly overruled by its decision in United States v. Goodwin, 470 F.2d 893, cert. denied, 411 U.S. 969.*

It is submitted, although the government relies heavily upon United States v. Goodwin in its memorandum in opposition, that the issues in this case were not decided in the Goodwin case. The decision in Goodwin turned on the defendant's failure to assert immunity and the absence of "some affirmative granting of immunity by the person taking the testimony***". 470 F.2d at 903-04. In the instant case, Petitioner did assert

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* To our knowledge, the second appeal in Seiffert, argued in the Fifth Circuit on February 5, 1974, has not been decided.

immunity, - from direct and indirect use of his testimony. The referee in bankruptcy who took Petitioner's testimony indicated that Petitioner did have immunity under the Bankruptcy Act, because he was "compelled to come to Court and testify."

Respectfully submitted,

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